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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JUAN FLORES-MENDEZ, an individual and
AMBER COLLINS, an individual, and on
behalf of classes of similarly situated
individuals,

Plaintiffs,

v.

ZOOSK, INC., a Delaware corporation; and
SPARK NETWORKS SE, a German
corporation,

Defendants.

Case No. 3:20-cv-04929-WHA

**REPLY IN SUPPORT OF MOTION
FOR LEAVE TO AMEND
COMPLAINT**

Additional Counsel for Plaintiffs and the Putative Class:

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1 Plaintiffs respectfully submit this reply in further support of their Motion for Leave to
2 Amend Complaint.

3 Plaintiffs' motion to amend, which was filed out of an abundance of caution, has arguably
4 been rendered moot and Plaintiffs' Second Amended Complaint (Doc. No. 77) is already or
5 should be considered the operative complaint in this action. The sufficiency of the reasserted
6 UCL claim, which is the only aspect of the amendment that Zoosk challenges, should be
7 evaluated on Zoosk's motion to dismiss that claim. (Doc. No. 79).

8 First, the motion to amend may not have been necessary and was filed out of an
9 abundance of caution. As explained in Plaintiffs' opening brief, in ruling on Zoosk's motion to
10 dismiss, the Court indicated that Plaintiffs may have an opportunity to amend the Complaint to
11 reassert dismissed claims, including the UCL claim which Plaintiffs reassert in the Second
12 Amended Complaint. Therefore, Plaintiffs' Second Amended Complaint was properly filed with
13 leave of the Court, consistent with Fed. R. Civ. P. 15(a)(2). Plaintiffs filed the instant motion out
14 of an abundance of caution in the event that they misinterpreted the Court's Order on Zoosk's
15 motion to dismiss and were being granted an opportunity to seek leave to amend, rather than
16 being granted leave to amend. They respectfully request that the Court clarify that the Second
17 Amended Complaint was properly filed as authorized by the Court's Order on Zoosk's motion to
18 dismiss.

19 Second, the motion to amend is effectively moot. Zoosk does not argue bad faith undue
20 delay, or prejudice. It argues only futility of the amendment and it only challenges the
21 amendment to the extent of the reasserted UCL claim. Contemporaneously with its opposition to
22 Plaintiffs' motion, Zoosk filed a motion to dismiss the UCL claim. As Plaintiffs noted in their
23 opening brief, "[o]rdinarily, courts will defer consideration of challenges to the merits of a
24 proposed amended pleading until after leave to amend is granted and the amended pleading is
25 filed." *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003).

26 Zoosk halfheartedly argues in a footnote (Opp. at 3 n.3) that the Court should not defer
27 consideration of the futility argument to the motion to dismiss stage, but its point lacks internal
28 consistency and is undercut by its own arguments and actions. Zoosk notes that consideration of

1 the futility argument is appropriate because “deferral is not necessary given Plaintiffs have already
2 filed the SAC” and “[t]he Court therefore has the requisite information at this juncture to make
3 specific findings as the futility of the SAC’s efforts to revive the[] dismissed UCL claim.” *Id.*

4 This argument, however, is a tacit acknowledgment that the Second Amended Complaint is
5 operative and that the true challenge to it is the question of whether it states a UCL claim as a matter
6 of law. Moreover, Zoosk has filed its motion to dismiss the UCL claim and cites to it repeatedly
7 in the abridged futility argument that it makes in opposition to the motion to amend. It is clear from
8 its conduct that Zoosk truly seeks dismissal based on the arguments in its motion to dismiss. Indeed,
9 there is no cogent reason for the Court to find futility on the motion to amend when the Court will
10 have a fully briefed motion to dismiss before it in short order and Zoosk relies on its arguments in
11 the motion to dismiss in support of its futility argument in the motion to amend. *See, e.g., Steward*
12 *v. CMRE Fin. Servs., Inc.*, No. 215CV00408JADNJK, 2015 WL 6123202, at *2 (D. Nev. Oct. 16,
13 2015) (“Deferring ruling on the sufficiency of the allegations is preferred in light of the more liberal
14 standards applicable to motions to amend and the fact that the parties’ arguments are better
15 developed through a motion to dismiss.”) (citing *In re Dynamic Random Access Memory (DRAM)*
16 *Antitrust Litig.*, 536 F. Supp. 2d 1129, 1135–36 (N.D. Cal. 2008)).

17 Moreover, as explained in Plaintiffs’ opening brief and as will be more fully explained in
18 Plaintiffs’ opposition to Zoosk’s motion to dismiss, Plaintiffs have stated a claim for violation of
19 the UCL. Plaintiffs have alleged that Zoosk’s conduct was unlawful because Zoosk violated the
20 FTC Act. Second Amended Complaint ¶ 90. Plaintiffs have alleged that the conduct was unfair
21 because, *inter alia*, Zoosk “failed to disclose the inadequate nature of the security of its computer
22 systems and networks that stored Plaintiffs’ and Class members’ sensitive PII[,]” “collected money
23 from the Subscription Subclass but failed to commit appropriate portions of that money to enact
24 security measures to protect Plaintiffs’ and Class Members’ PII[,]” and “it failed to use reasonable
25 security measures to protect Plaintiffs’ and Class Members’ PII.” *Id.* at ¶¶ 92–94. Finally, Plaintiffs
26 allege that they had losses on account of the breach because, *inter alia*, Plaintiff Flores-Mendez
27 paid for Zoosk’s service, which failed to provide the level of service expected because it did not
28 protect his data, because Plaintiffs have a property interest in their data, because Plaintiffs have

1 been required to spend time monitoring their financial accounts, because their data is valuable and
 2 they experienced a loss when it is accessed by those with malicious intent, and because Zoosk did
 3 not provide them with appropriate data monitoring services to protect themselves from future harm.
 4 *Id.* at ¶¶ 3, 18, 24–29, 47–57, 97–98.

5 CONCLUSION

6 For the reasons stated above, the Court should clarify that Plaintiffs' Second Amended
 7 Complaint is the operative Complaint and filed with leave of the Court pursuant to its Order on
 8 Zoosk's motion to dismiss, or the Court should grant Plaintiffs' motion together with such other
 9 and further relief as the Court deems just and proper.

10 Dated: August 18, 2021

By: /s/ Kiley L. Grombacher
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